Now the Australian Tax and Social Services Contribution Assessment Act 1936-1963 contains in section 201 provisions almost identical with section 82 of the 1947 Ordinance or section 103(1) of the 1967 Act, and for a time, I considered that the present case might well be a case in which there would be justification in acceding to the application.

I have unfortunately not been able to secure the full judgment of the case but after some cogitation, I have come to the view that however persuasive and even attractice it may be, the dictum cannot justify me in disregarding the judicial pronouncement made in the courts of this country and of Singapore which have been referred to earlier on. This is especially so because I cannot honestly find any justification to differ. The language of the statutes is clear and unambiguous and effect must be given to it. The circumstances may well be particularly difficult for the tax-payer but then hard cases never make good law.

For these reasons, the application to strike out the statement of claim is dismissed and for the same reasons, the application for further and better particulars is refused. For whatever good it will serve, the defendant will have 14 days within which to deliver his defence, but this should not preclude the Government from proceeding under O.14 Rules of the Supreme Court on the application of section 142(1) of the Income Tax Act 1967. The defendant must pay for the costs of the application.

Application refused.

Solicitors: *Allen & Gledhill.*

COMPTROLLER-GENERAL OF INLAND REVENUE v. N.P.

[O.C.J. (Chang Min Tat J.) December 18, 1972]

[Ipoh — Civil Action No. K 111 of 1970]

Income Tax — Tax to be paid notwithstanding appeal — Certificate of Comptroller as to amount of tax — Federal Constitution, Art. 13(1) — Income Tax Ordinance, 1947, ss. 82 & 86(3).

In this case it was argued (a) that the provisions of section 82 of the Income Tax Ordinance, 1947 (which requires tax to be paid notwithstanding an appeal) are void as being inconsistent with article 13(1) of the Federal Constitution (which provides that no person shall be deprived of property save in accordance with law); (b) that section 86(3) of the Ordinance, (which makes the certificate of the Comptroller as to the amount of tax due by a defendant "sufficient evidence" of the amount so due) should not be applied where an objection or appeal has been lodged.

Held: (1) the legislation in this case was duly passed by Parliament and is therefore in accordance with law;

(2) the proceedings being essentially a matter of giving effect to the statutory provisions of the law, do not, in law call into question the effect of any provision of the Constitution and therefore in accordance with section 86(3) of the Income Tax Ordinance judgment must be given for the Comptroller.

Cases referred to:-

(1) *State of West Bengal* v. *Subodh Gopal* [1954] S.C.A. 65 at page 117.

(2) *Tinsa Mau Naing* v. *Commissioner of Police, Rangoon & Anor.* [1950] Burma Law Reports 17.

CIVIL ACTION.

Zulkifli bin Mahmood (Senior Federal Counsel) for the plaintiff.

M. Sivalingam for the defendant.

Chang Min Tat J.: This action was first instituted in the High Court at Ipoh and then transferred to the Sessions Court of the Special President. An application was made to the Special President under section 30 of the Courts of Judicature Act 1964 for transmission of the proceedings to the High Court on the grounds that a question had arisen as to the effect of a provision of the Constitution. It now comes before me for my consideration.

Now in this action, the Comptroller-General of Inland Revenue Malaysia claimed from the respondent tax-payer the sum of $5,901.33¢, being —

(a) Amount of income tax due and payable for the year of assessment 1960 pursuant to the provisions of the Income Tax Ordinance 1947	$18,676.75
(b) Amount of penalty added pursuant to section 84(1) Income Tax Ordinance 1947	401.33
	$19,078.08
less payment	$13,176.75
	$ 5,901.33

In his amended statement of defence, the tax-payer first denied liability for the sum claimed.

This defence, though not strictly germane to my decision, should I think be considered as it must have some bearing on the question I have to answer. On consideration, it can be seen to be easily disposed of by recourse to arithmetic. The original assessment was for $18,676.75. Tax paid by the defendant came to $7,500 and on the agreement of the plaintiff to stand over $7,000 of the claim, upon receipt of an objection by the defendant, the latter paid four other sums at various dates. They totalled $4,176.75¢. In other words he had by his last payment paid $11,676.75¢ It was not correct for him to say that his tax liability was settled at this figure. There was that sum of $7,000 which had been stood over. In respect of this sum, the defendant paid $1,500, leaving a balance of $5,500. It is this sum of $5,500 which constituted the balance of the defendant's liability for tax for the year of assessment 1960 and which added to the $401.33 imposed as penalty made up the sum of $5,901.33¢ claimed in this action.

The defendant however stated in his defence that he did not understand why the sum of $401.33¢ was added as a penalty. As to this, there is an exhibit annexed to an affidavit in support of a summons under 0.14 Rules of the Supreme Court to sign final judgment. The exhibit was a copy of an Income Tax demand note which had been served on him and which showed the imposition of the statutory 5% under section 84(1) of the Income Tax Ordinance for non-payment of the tax balance of $8,026.75¢, after payment of $10,650 had

been credited against the liability for $18,676.75¢. I should have imagined that the tax-payer fully well knew how and why the penalty was imposed.

Now the notice of assessment was made on 7 May 1966. Objection was lodged on 28 May 1966. I am without advice as to the state of the objection proceedings of the tax stood over of the $7,000 but in the court file in the same affidavit, the plaintiff was alleged to have found no justifiable grounds to extend the time for payment. I am similarly without advice whether the objections have been pursued and the proceedings taken a step further by going before the Board of Review, but I would remark again that towards this sum of $7,000, the defendant paid a further sum of $1,500.

However in the present application, it is contended that section 82 which reads —

"82. Subject to the provisions of section 87 of this Ordinance, tax for any year of assessment levied in accordance with the provisions of section 38 or 39 of this Ordinance shall, notwithstanding any objection or appeal against the assessment on which such tax is levied, be payable at the place stated in the notice given under section 72 of this Ordinance within one month after the service of such notice:
Provided that —

(a) where collection of tax has remained in abeyance pending the determination of any objection or appeal against an assessment made prior to the first day of January, 1960, such tax shall be payable not later than the first day of September, 1960;

(b) the Comptroller in his discretion may extend the time limit within which payment is to be made."

and which was introduced by an amending Ordinance No. 17 of 1960 is void as being inconsistent with Article 13(1) of the Federal Constitution, providing that —

"No person shall be deprived of property save in accordance with law."

and on the further contention that section 86(3) which reads —

"86(3) In any suit under sub-section (1) of this section the production of a certificate signed by the Comptroller giving the name and address of the defendant and the amount of tax due by him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for the said amount."

should not be, if I may condense the defence, applied where an objection on appeal had been lodged. This contention is said to raise a question as to the effect of a provision of the Constitution.

Read as a whole, Part XIII of the Ordinance regarding the collection, recovery and repayment of tax, must be seen to be a legislative provision for the speedy collection and recovery of taxes subject to provisions for repayment of taxes over-collected or not due, and an answer to the delaying tactics of tax-payers in lodging objections and appeals, especially where such tactics are frivolous and vexatious. If in such provisions the innocent are penalised together with the guilty, the blame must in the final analysis be laid on the latter. But the legislature has seen fit, in its wisdom, to make such provisions and fortunately, it is not for me to question the wisdom of the legislature or to consider whether or not there is sufficient justification for such provisions.

I have given this case my full consideration. It is I admit a somewhat troubled consideration. To anyone brought up in the rule of law, the provision in section 86(3) which effectively deprives the court of its proper function to be a trier of facts and the interpreter at this stage of the law as enacted by Parliament, must be felt to offend the susceptibilities of the legal mind but however regrettably, I must inevitably come to the conclusion that this very argument affords the answer to my doubts. The question must be whether the legislation which is said to be offending is, in terms of the Constitution, especially of Article 13(1), "in accordance with law." If it is, then whatever one's feelings may be, there is nothing to do but to apply the law in furtherance of one's duty. As to this there can be, *prima facie*, no doubt that the legislation was duly passed by Parliament in the exercise of its sovereign function of legislating under the Constitution. It is therefore in accordance with law. As has been held in *State of West Bengal* v. *Subodh Gopal*[1] Clause (1) of Article 31 of the Indian Constitution, which is *in pari materia* with Article 13(1) of our Federal Constitution, is intended as a limitation upon the Executive as in England, and not upon the Legislature.

In the construction of what "law" in this context means, it therefore appears reasonably clear that it means enacted law and that there can be no resort to natural justice. The Supreme Court of Burma has in a decision *Tinsa Maw Naing* v. *The Commissioner of Police Rangoon And Anor.*,[2] for which I was greatly indebted to Mr. Sivalingam for the tax-payer who drew my attention to it and supplied me with a xerox-ed copy, though it was most damaging to his case, construed the meaning of the phrase "save in accordance with law" in Article 16 of the then Burmese Constitution which read —

"No citizen shall be deprived of his personal liberty ... save in accordance with law."

and held that "when the Constitution speaks of 'law' it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature."

The judgment goes on to say at p. 25-26:

"On principle also it seems to us difficult to accept the suggested contrary concept of 'law' equating it with principles of absolute justice or the rules of natural justice as they have sometimes been called. With changing social and political conditions, notions regarding natural law change; all that remains constant is the appeal to something higher than positive law. Rules of natural law are the mirage which ever recedes from the traveller seeking to reach it. They are no doubt ideals to which positive law should strive to conform. But to accept natural law as a higher law which invalidates any inconsistent positive law would lead to chaos. There is no certain standard and no measuring rod by which the so-called principles of natural justice can be ascertained or defined. Each judge administering natural justice would be a law unto himself. In seeking to escape from the arbitrary exercise of power by the State, the exponents of this principle would but place themselves under the exercise of arbitrary powers by the judges. The burden on judges also could be intolerable. No judge worthy of his office relishes the exercise of arbitrary powers whether by himself or by any other person."

This, to my mind, is a very salutary reminder and a timely recall to reason, and with respect and humility, I adopt this dictum, as indeed I must.

This does not mean of course that there is no function in the courts to declare whether a specific law is *intra vel ultra vires* the Constitution, which is the supreme law of the land. Both counsel concede this

but with respect, and this was the other difficulty I met with in this case, both were mistaken in taking the point intra vel ultra vires before me, *via* section 30 of the Courts of Judicature Act. It would clearly have been the easier course if recourse had been made for a declaratory order under Article 4 of the Constitution, and after leave had been obtained, if the matter is placed before the Federal Court which under Article 128 has the exclusive original jurisdiction to declare invalid any law if such was the case.

In the High Court, all that a puisne judge is concerned with is to apply the law as duly enacted by Parliament.

In the present proceedings, it cannot be gainsaid that section 86(3) was so enacted. Consequently I must take the view that the proceedings being essentially a matter of giving effect to the statutory provisions of this section do not, in law, call into question the effect of any provision of the Constitution. There is therefore nothing left for me to do but to give judgment for the Government with costs.

Order accordingly.

Solicitors: *Lim Cheng Ean & Co.*

MUSA BIN SALLEH v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P. Suffian and Ali F.JJ.), January 24, 1973]

[Kuala Lumpur — Federal Court Criminal Reference No. 4 of 1972]

Internal Security — Detention Order under s. 8(1)(a) of Internal Security Act, 1960 — Whether it is valid to make restriction order under s. 8(1)(b) of Act at expiry of detention order — Liability of the subject — Doubt to be construed in favour of accused.

The appellant had been originally detained under an order made on January 10, 1964 under section 8(1)(a) of the Internal Security Act, 1960. In 1964 section 8 of the Act was amended to give power to the Yang di-Pertuan Agong (later the Minister) to order that a detention order be extended for a further period or periods not exceeding two years. On January 10, 1966, an order was made extending the period of the appellant's detention for another two years. This second order was due to expire on January 10, 1968. A day before that, there was served on the appellant, a restriction order under section 8(1)(b) of the Internal Security Act 1960, whereby he was released but restricted to residence in the Pasir Puteh police district. The appellant failed to comply with this order and he was charged for failure to do so. At the trial before the Sessions Court he was acquitted but on appeal a retrial was ordered by Syed Othman J., who held that the restriction order was valid. The appellant was subsequently retried and found guilty. His appeal to the High Court was dismissed by Ibrahim J. who however referred the following questions to the Federal Court —

(a) Whether there has been a miscarriage of justice as respects the retrial (before the Second President) by reason that the conviction of the (appellant) was predetermined as soon as the (appellant) was called to answer the charge preferred against him and that the hearing afforded to the (appellant) was a mere formality;

(b) whether an order made in respect of the (appellant) by the Minister charged with responsibility for internal security under section 8(1)(b) of the Internal Security Act 1960 on certain facts is valid, having regard to the Minister's having previously already made and renewed in respect of the (appellant) an order under section 8(1)(a) of the said Act on the same facts.

Held: (1) there was no miscarriage of justice in this case, as there was a proper trial and there was nothing improper in the President's holding that he was bound by the ruling of the High Court that the order of the Minister was a valid order;

(2) *Per* Azmi L.P. and Suffian F.J. (Ali F.J. dissenting), the restriction order in this case was valid. If on one set of facts a detention order under paragraph (a) of section 8(1) of the Internal Security Act, 1960 is made by the executive it is open to them on the same facts to extend that order under sub-section (1A) and also on the same facts it is open to them after the expiration of that order to substitute for it a restriction order made under paragraph (b) of section 8(1) of the Act;

(3) (*Per* Azmi L.P. and Suffian F.J.), there was no evidence to show *mala fides* in this case and therefore the *restriction order could not be impugned* on this ground.

Cases referred to:-

(1) *Public Prosecutor* v. *Musa* [1970] 1 M.L.J. 101.

(2) *R.* v. *Captain Douglas Marr* [1946] M.L.J. 77 at p. 82.

The following cases were also cited in argument: *Pandit* [1964] 1 S.C.R. 926, 939; *Re Dillet* (1887) 12 App. Cas. 459, 467; *Mohiddeen Singh* (1932) L.R. 59 I.A. 233, 235; *Lanier* v. *R.* [1914] A.C. 221, 230; *Soo Kua* v. *Public Prosecutor* [1970] 1 M.L.J. 91; *Commissioner of Customs & Excise* v. *Cure & Deeley* [1962] 1 Q.B. 340, 366; *Liversidge* v. *Anderson* [1941] 2 All E.R. 613; *Ross Clunis* [1958] 2 All E.R. 23, 32(H); *H.P.C. Production Ltd.* [1962] 1 All E.R. 37, 41, C3; *Oliver* [1966] 2 All E.R. 459, 466.

FEDERAL COURT.

Raja Abdul Aziz bin Raja Addruse for the appellant.

Abdullah bin Ngah (Deputy Public Prosecutor) for the respondent.

Suffian F.J.: Musa bin Salleh, the appellant, was the subject of a detention order made in 1964 by the Minister of Internal Affairs under para. (a) of subsection (1) of section 8 of the Internal Security Act No. 18 of 1960.

In 1966, the Minister made an order directing that the appellant be further detained for two years. That order would have expired on 10th January, 1968.

On the previous day, i.e. on 9th January, 1968, there was served on the appellant a third order (Exhibit P1) made by the Minister under para. (b) of subsection (1) of section 8. The appellant was released from detention at 5.45 p.m. that day but on condition among others that he reside in Pasir Puteh Police District and not leave it without the prior written permission of the O.C.P.D.

There was evidence that the appellant refused to accept these conditions. To cut a long story short, the appellant was released from detention and went to live in Pasir Puteh Police District. Subsequently he was found at Kota Bahru where he had gone without the O.C.P.D.'s permission and he was accordingly charged with committing an offence under section 44 of the Internal Security Act.

At his trial the prosecution gave evidence, the appellant gave evidence, and after considering counsel's addresses the learned President, Encik Gulam Mustaffa, acquitted and discharged the appellant on the ground that the third order (Exhibit P1) was void.